PD-0823-21
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 12/1/2021 3:09 PM
Accepted 12/3/2021 12:55 PM
DEANA WILLIAMSON
CLERK

PD-0823-21
In the Court of Criminal Appeals of Texas
At Austin

FILED
COURT OF CRIMINAL APPEALS
12/7/2021
DEANA WILLIAMSON, CLERK

———♦———

No. 14-20-00496-CR
In the Court of Appeals
For the Fourteenth District of Texas
At Houston

———♦———

No. 1667833
In the 230th District Court
Of Harris County, Texas

———♦———

State of Texas
Appellant

v.

Sanitha Lashay Hatter
Appellee

———♦———

State's Petition for Discretionary Review

———♦———

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Oral Argument Requested

Statement Regarding Oral Argument

The State requests oral argument.

Identification of the Parties

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Appellee:

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Trial Court:

Chris Morton, presiding judge

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Statement of the Case

This is a State's appeal from the trial court's order that the State dismiss a charging instrument.

In 2019 the appellee was indicted for assault of a peace officer. (CR 15). In January 2020 the State moved to dismiss this charge, noting explicitly it reserved the right to refile. (CR 53). The appellee was indicted a second time for the same offense in March 2020. (CR 6).

The appellee filed a motion for "specific performance," alleging the prosecutor made a "gentlemen's agreement" not to refile when the first charge was dismissed. (CR 65-68). The trial court granted the motion for "specific performance," writing on the order: "State is ordered to dismiss." (CR 62-64). When it granted the motion, the trial court orally declared the case "dismissed." (1 RR 30). The State filed a timely notice of appeal. (CR 78-79).

A divided panel of the Fourteenth Court affirmed the trial court's ruling in a published opinion. *State v. Hatter*, ___S.W.3d___, No. 14-20-00496-CR, 2021 WL 4472551 (Tex. App.—Houston [14th Dist.] Sept. 30, 2021).

Ground for Review

The Fourteenth Court erred by holding that a motion to dismiss that explicitly reserved the State's right to refile was retroactively converted into an "immunity agreement" when the trial court dismissed a subsequent case on grounds of equitable immunity. Nothing in the record shows the trial court ever consented to an immunity agreement.

Reasons to Grant Review

The Fourteenth Court's published opinion creates a novel and illogical interpretation of this Court's holding in *Smith v. State*, 70 S.W.3d 848 (Tex. Crim. App. 2002). In *Smith* this Court held that for an immunity agreement to be enforceable it must be approved by the trial court and the trial court must be aware it was approving an immunity agreement. Here, the Fourteenth Court held the trial court did not have to be aware of the immunity agreement when the agreement was entered, but could approve an immunity agreement through a subsequent dismissal.

This holding has no basis in *Smith* and no basis in the record. The record shows the trial court based the subsequent dismissal on a theory of equitable immunity, which this Court has declared does not apply in Texas. At no point did the trial court approve an immunity agreement and the Fourteenth Court's holding that a subsequent dismissal on a

different basis counts as retroactive creation of an "immunity agreement" flouts *Smith's* and Article 32.02's requirement that trial courts consent to immunity agreements.

Statement of Facts

The appellee was originally charged with two misdemeanor DWI charges as well as felony assault of a peace officer. (1 RR 7-8). One of the DWI charges came from the same incident as the assault charge. (1 RR 8). Based on the assaulted officer's concern about the appellee's substance abuse problem, the State offered to dismiss the felony charge if the appellee pleaded guilty to the DWI charges. (1 RR 9-10; CR 74).

The appellee had different lawyers for the felony and misdemeanor charges. (CR 75). The lawyer for the felony approved of this deal, but the lawyer for the misdemeanors did not. (CR 75).

While negotiations were ongoing, the felony case got set for trial before the misdemeanor cases. (1 RR 10-11). The felony prosecutor believed it was unfair to proceed to trial on a case the State had offered to dismiss. (1 RR 11, 17). Believing the appellee would wind up pleading guilty to at least one of the DWI charges, the prosecutor moved to dismiss the felony charge while reserving the State's right to refile. (1 RR

10-11). The trial court signed the dismissal on January 20, 2020. (CR 53).

After the felony was dismissed, the DWIs were also dismissed without the felony prosecutor's knowledge. (1 RR 18). The assaulted officer contacted the District Attorney's Office, and supervisors at the office decided to refile the felony charge. (1 RR 12).

The grand jury reindicted the appellee on March 11, 2020. (CR 6). The appellee filed a "Motion for Specific Performance," a brief in support of this motion, and an "affidavit"[1] from defense counsel. (CR 62-63, 65-68). The gist of these documents is that the felony prosecutor had made a "gentlemen's agreement" to dismiss the felony charge and never refile it. The documents did not say the appellee gave any consideration as part of this agreement.

The trial court held a hearing where the prosecutor testified. The prosecutor said he did not remember saying he "promised" not to refile, or making a "gentlemen's agreement" not to refile. (1 RR 13-14). The prosecutor argued it did not matter if he used those phrases, because the appellee gave no consideration for the promise and the trial court

[1] The "affidavit" contains a Harris County District Court seal but does not have a signature showing who it was sworn before. At this point, though, it's not obvious it matters whether the document met the requirements of an affidavit.

did not approve any immunity agreement, so any promise was unenforceable. (1 RR 26-27).

The trial court found that the felony prosecutor was "an honorable, forthright, and honest prosecutor." (1 RR 30). The trial court believed defense counsel's statement that the prosecutor had "promised" to dismiss the case and not refile, and determined the prosecutor just did not remember making the promise. (1 RR 30). After stating "contract law" was not "something that we hear in here," the trial court granted the motion for "specific performance," and declared the case "dismissed." (1 RR 30). On the written order granting the motion for "specific performance," dated June 16, 2020, the trial court handwrote: "State is ordered to dismiss." (CR 64).

In the Fourteenth Court

I. Arguments of the Parties

A. The State appealed, arguing the trial court was without authority to dismiss the case based on an unbargained-for promise that had not been approved by the trial court in the January dismissal.

The State's main argument to the Fourteenth Court was that the January dismissal was not an enforceable immunity agreement because it had not been approved as such by the trial court, as shown by the

dismissal's explicit statement that the "State reserves right to refile." (State's Appellate Brief at 10-11). The State argued that the appellee's due process arguments failed because due process requires dismissal only if the defendant gives consideration as part of the bargaining process. (State's Appellate Brief at 11-12). Finally, the State argued the contract-law concept of "specific performance" did not justify dismissal because a party seeking specific performance must show it fulfilled its end of the contract, and the appellee had not. (State's Appellate Brief at 11-12-14).

B. The appellee argued dismissal was required because of "due process."

The appellee argued, as she had in the trial court, that "due process … requires that a promise by the prosecutor be fulfilled." (Appellee's Appellate Brief at 10 (quoting *Gibson v. State*, 803 S.W.2d 316, 318 (Tex. Crim. App. 1991)). The appellee argued her failure to give any consideration as part of the agreement was the State's fault because the State had dismissed the misdemeanor cases. (*Id.* at 10-11).

II. The Majority and Dissenting Opinions

A. Using an argument it came up with on its own, the panel majority held that the trial court's June dismissal was retroactive approval of the January dismissal as an "immunity agreement."

Writing for a 2-1 majority, Justice Hassan noted the rule that an immunity agreement is not enforceable unless it is approved by the trial court. *Hatter*, 2021 WL 4472551, at *3-4. Even so, she held that the January dismissal—which stated "State reserves right to refile—was part of an enforceable immunity agreement. *Id.* at *4.

This was so because "neither statute nor case law indicates that the trial court's approval of an immunity agreement must be concurrent with the offer itself." *Ibid.* By granting the State's motion to dismiss in January, and the appellee's motion to dismiss in June, the trial court "suppl[ied] the necessary approval both when the agreement was made and when Appellee sought to have it enforced." That is, the June dismissal retroactively approved the prosecutor's unwritten January promise not to refile as an "immunity agreement."

Justice Hassan rejected the State's argument that the prosecutor's "promise" was unenforceable because the appellee had provided no consideration. *Ibid.* This point failed, she held, because the terms and enforcement of an immunity agreement are between the parties, and the

trial court's only role is to approve or reject the agreement. *Ibid.* (citing *Smith*, 70 S.W.3d at 855).

Justice Hassan concluded the majority opinion arguing that if it held the trial prosecutor's promise was unenforceable based on a lack of consideration, it "would effectively decree that a prosecutor's word is worthless, thereby inviting countless foreseeable incidents of mistrust between the State and the accused in Texas." *Id.* at *5.

B. The dissenter would have held the prosecutor's unbargained-for promise was not an "agreement," and it was not enforceable because the appellee gave no consideration.

Justice Jewell dissented because he believed "the majority's disposition has no basis in law and mischaracterizes the facts." *Ibid.* at *5 (Jewell, J., dissenting).

First, Justice Jewell disagreed that there was any sort of agreement: "What the majority characterizes as an 'agreement' is at most a unilateral promise by the prosecutor." *Id.* at *9. Justice Jewell noted that the trial court had found there was a "promise," but the trial court had not found there was any sort of "agreement."

Relying on contract law, Justice Jewell would have held that for an "agreement" to exist there needed to be consideration from both sides.

Ibid. He characterized the prosecutor's gratuitous promise as "at most a unilateral promise, which generally is not enforceable absent consideration." *Ibid.* The lack of consideration made the promise "illusory" and unenforceable. *Ibid.*

Justice Jewell questioned whether the prosecutor's statement was even a "promise." That's because a promise must be "so made as to justify a promissee in understanding that a commitment has been made." *Ibid.* (quoting Restatement (Second) of Contracts, § 2). Because the January motion to dismiss explicitly reserved the State's right to refile, and the appellee was aware of this, the prosecutor's statement was not a promise: "Even if a present intention is manifested, the reservation of an option to change that intention means that there can be no promissee who is justified in an expectation of performance." *Ibid.* (quoting Restatement (Second) of Contracts, § 2 cmt. e.).

Justice Jewell moved on to argue against the majority's conclusion that the trial court ever approved an immunity agreement. He began by noting the original motion to dismiss explicitly reserved the right to refile, meaning the January dismissal was not trial court approval of an immunity agreement. *Id.* at *10-11.

Second, he argued the majority's conclusion that the June dismissal was retroactive approval of a January immunity agreement "has several fatal problems." *Id.* at *11. First, the majority had based its ruling on Code of Criminal Procedure Article 32.02, but that article relates only to motions to dismiss filed by the State. *Ibid.* Second, the appellee's motion sought specific performance of a binding agreement, which presupposes a binding agreement. If there was no binding agreement before the appellee filed her motion, there was nothing to enforce and the trial court erred to grant the motion. *Ibid.*

Ground for Review

The Fourteenth Court erred by holding that a motion to dismiss that explicitly reserved the State's right to refile was retroactively converted into an "immunity agreement" when the trial court dismissed a subsequent case on grounds of equitable immunity. Nothing in the record shows the trial court ever consented to an immunity agreement.

For its novel holding that the trial court's ruling in June turned the January dismissal into an immunity agreement—which was not the basis for the trial court's ruling—the panel majority relied on *Smith*. But *Smith* requires the trial court to be aware that a State's motion to dismiss is made pursuant to an immunity agreement for that agreement to be binding. *See Smith*, 70 S.W.3d at *855 (immunity agreement is valid if

"the judge approves that dismissal that results from an immunity agreement, and is aware that the dismissal is pursuant to an immunity agreement").

Neither the trial court nor the appellee have ever claimed the trial court was aware the January dismissal was pursuant to an immunity agreement. Allowing retroactive "approval" of an agreement undermines *Smith*, which was based on Article 32.02's requirement that dismissal of a case requires the presiding judge's "consent." TEX. CODE CRIM. PROC. art. 32.02. If a judge does not know he is signing an immunity agreement—effectively dismissing all future attempts to charge the defendant—then he cannot consent to it. Allowing retroactive consent like the Fourteenth Court did here encourages messy hearings based on parol evidence, but does not address the basic question *Smith* demands: Did the trial court consent to the dismissal?

Nothing in the trial court's June dismissal shows consent to an immunity agreement. All defense counsel requested was that the trial court enforce the prosecutor's "promise" under principles of "due process." The trial judge's holding was responsive to this request: "I'm inclined to grant [the appellee's] motion for specific performance … which I believe is the honoring of the promise…" (RR 30).

The trial judge never consented to an immunity agreement, nor was he asked to. The trial court's actual ruling—which enforced against the State a promise that had not been consented to by trial court—was actually about equitable immunity, a doctrine this Court has emphasized does not apply in Texas. *See Graham v. State*, 994 S.W.2d 651, 656 (Tex. Crim. App. 1999) (rejecting contention that promise not to prosecute that was not approved by trial court was binding); *Smith*, 70 S.W.3d at 851 (citing *Graham* for proposition that "the doctrine of equitable immunity does not exist in Texas.").

On appeal from an order dismissing an indictment, appellate courts defer to the trial court's fact findings but review *de novo* legal conclusions that do not turn on credibility *de novo*. *State v. Krizan-Wilson*, 354 S.W.3d 808, 815 (Tex. Crim. App. 2011). The trial court found there was a "promise," but it never found there was an immunity agreement nor did it consent to an immunity agreement. The trial court's ruling regarded due process, or equitable immunity, or maybe specific performance. The trial court's ruling did not regard an approved immunity agreement because no one claimed there was an approved immunity agreement.

The Fourteenth Court erred to hold that the trial court's ruling about the enforceability of the prosecutor's promise was approval of an immunity agreement. Because the trial court never approved an immunity agreement, that could not be a basis for dismissal and the Fourteenth Court erred by affirming the trial court on that basis.

Conclusion

The State asks this Court to grant review, reverse the Fourteenth Court's judgment, and remand the case to the trial court with orders to reinstate the charge. Alternatively this Court could reverse the Fourteenth Court and remand for consideration of the trial court's ruling and the appellee's arguments.

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Certificate of Compliance and Service

I certify that, according to Microsoft Word, the portion of this brief for which Rule of Appellate Procedure 9.4(i)(1) requires a word count contains 2,287 words.

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Date: December 1, 2021

Appendix

***State v. Hatter*, ___S.W.3d___, No. 14-20-00496-CR, 2021 WL 4472551 (Tex. App.—Houston [14th Dist.] Sept. 30, 2021)**

2021 WL 4472551
Only the Westlaw citation is currently available.
Court of Appeals of Texas, Houston (14th Dist.).

The STATE of Texas, Appellant
v.
Sanitha Lashay HATTER, Appellee
In re The State of Texas ex rel. Kim Ogg

NO. 14-20-00496-CR, NO. 14-20-00539-CR

Opinions filed September 30, 2021

Synopsis

Background: After accused was charged with felony assault of a public servant, the 230th District Court, Harris County, Chris Morton, J., granted State's motion to dismiss. After State re-filed the felony charge approximately two months later, the District Court, Morton, J., granted accused's motion for specific performance of State's grant of immunity from prosecution and ordered State to dismiss the case. State filed both a direct appeal and a petition for writ of mandamus.

Holdings: The Court of Appeals, Hassan, J., held that:

the practical effect of the District Court's order granting accused's motion for specific performance and ordering State to dismiss was to preclude further prosecution, and thus State had right to appeal from order;

State's petition for writ of mandamus was moot; and

the District Court provided its necessary approval to render enforceable State's grant of immunity to accused from prosecution for felony assault of public servant.

Affirmed; writ denied.

Jewell, J., dissented and filed an opinion.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

ORIGINAL PROCEEDING WRIT OF MANDAMUS, 230th District Court, Harris County, Texas, Trial Court Cause No. 1667833

Attorneys and Law Firms

Clinton Morgan, Houston, for Appellant.

Tonya Rolland McLaughlin, Houston, for Appellee.

Panel consists of Justices Jewell, Bourliot, and Hassan

OPINION

Meagan Hassan, Justice

***1** Appellee Sanitha Lashay Hatter was arrested for felony assault of a public servant and misdemeanor driving while intoxicated ("DWI"), both of which arose from the same incident. While these charges were pending, Appellee was charged with a second misdemeanor DWI. In the underlying proceeding, the felony assault charge proceeded independently and was scheduled for trial prior to any disposition of the misdemeanor charges.

The State filed a "Motion to Dismiss" with respect to the felony charge, which the trial court granted. According to the State's prosecutor, the felony charge was dismissed based on the understanding that Appellee would plead guilty to the misdemeanor charges. But the misdemeanor charges also were dismissed shortly thereafter. The State re-filed the felony charge approximately two months later.

In response, Appellee filed a "Motion for Specific Performance" asking the trial court to enforce the prosecutor's "promise of a dismissal" with respect to the felony charge. The trial court granted the motion and dismissed the felony charge.

The State filed both a direct appeal (case no. 14-20-00496-CR) and a petition for writ of mandamus (case no. 14-20-00539-CR) challenging the trial court's order dismissing the felony charge. In the ordinary appeal proceeding, we affirm the trial court's order dismissing the felony charge. We deny the State's petition for writ of mandamus as moot.

BACKGROUND

In the underlying proceeding, an indictment was filed charging Appellee with felony assault of a public servant. *See* Tex. Penal Code Ann. § 22.01(b-2). In January 2020, the State filed a "Motion to Dismiss" requesting the trial court dismiss the felony charge. In the section of the motion entitled "Explanation", the State noted that it "reserves the right to refile." The trial court granted the motion to dismiss.

In March 2020, the State re-filed the felony assault charge against Appellee. Appellee filed a "Motion for Specific Performance" requesting that the trial court enforce the felony prosecutor's "promise of a dismissal." In support of her motion, Appellee asserted that the felony prosecutor made "several representations to the Defense that no refile would occur," including "multiple statements guaranteeing a dismissal of this case 'no matter what,' that the State and the Defense had a 'gentleman's agreement,' and that the State promised to not refile the case against [Appellee]."

Appellee also filed an unsworn declaration by defense counsel. In relevant part, the declaration states:

> The offer from the State to my client in our felony case was that in exchange for a plea of guilty in her Driving While Intoxicated case(s), her Assault of a Public Servant case would be dismissed. Another attorney represented [Appellee] on both of her misdemeanor cases. That attorney did not want to plea [Appellee] to her Driving While Intoxicated charges so that she could get a dismissal on her felony case. Because [Appellee's] felony disposition was contingent on her misdemeanor dispositions and her misdemeanor attorney's unwillingness to negotiate a plea with that agreement, I felt [Appellee] was being treated unfairly.
>
> ***2** I spoke on many occasions to the chief prosecutor on the felony case, Mr. James O'Donnell. Mr. O'Donnell understood the problem and unfairness surrounding the misdemeanor disposition affecting [Appellee's] felony disposition. After speaking to him on many occasions (of which I do not remember the dates), we were able to come to an agreement. Mr. O'Donnell agreed that regardless of the disposition of the misdemeanor Driving While Intoxicated cases, he would dismiss the felony Assault of a Peace Officer. He made multiple promises to me that he would not only dismiss the felony case regardless of the misdemeanor dispositions, but that he would promise to never re-file the felony case. He made this guarantee to me multiple times while in the 230th courtroom at 201 Caroline. ... Mr. O'Donnell told me that he would give the reason of "other" on the dismissal and would write "subject to re-file" although he again promised that he would not do so and no one else would either.

Continuing on, defense counsel's declaration states that Appellee's misdemeanor charges were dismissed "because both of those cases contained faulty blood vials". Defense counsel asserted that, following these dismissals, O'Donnell's supervisors ordered him to re-file the felony charge against Appellee.

The trial court held a hearing on Appellee's motion in June 2020. Testifying at the hearing, O'Donnell said Appellee's felony case was set for trial prior to the disposition of her misdemeanor charges and the State offered to "dismiss the felony case if [Appellee] pled on the [misdemeanor] DWI cases." According to O'Donnell, at this time he was "under the impression that the DWI cases would be worked out" and "didn't feel it was appropriate to try [Appellee's] [felony] case when [he] had made the — extended the offer to dismiss the felony if [Appellee] had pled on the DWIs."

O'Donnell testified that he "remember[ed]" his discussions with defense counsel "regarding the case and that [he] would not re-file the case and that [he] would not instruct any of [his] prosecutors to re-file the case." O'Donnell said he could not recall "the exact words that were used" but "remember[ed] telling [defense counsel] that [his] intention was to dismiss the case and that it was not [his] intention to re-file this case." O'Donnell did not recall using the words "gentleman's agreement" or "promise" in his conversations with defense counsel. At the time the felony charge was dismissed, O'Donnell said the "the prosecutors in the misdemeanor court were in the process of evaluating their cases" against Appellee.

According to O'Donnell, it was not his decision to re-file the felony charge against Appellee; rather, that decision was made by O'Donnell's supervisors. O'Donnell said the complaining witness in the felony assault case "brought it to the DA's office's attention to re-file" the case.

After hearing the evidence and the argument of counsel, the trial court found O'Donnell to be "an honorable, forthright, and honest prosecutor"; it found defense counsel's declaration to be true and correct; and it found that O'Donnell promised to dismiss the case without re-filing but simply did not remember making that promise. The trial court granted the motion for specific performance and declared on the record that the case "is dismissed." On the signed order granting the motion, the trial court wrote, "State is ordered to dismiss."

The State filed this appeal together with an alternative

petition for writ of mandamus.

ANALYSIS

I. Jurisdiction

This case presents an initial question regarding whether the appropriate vehicle for potential appellate relief is by mandamus or ordinary appeal.

The State may appeal a trial court order that dismisses a charging instrument. *See* Tex. Code Crim. Proc. Ann. art. 44.01(a)(1). The State's right to appeal the dismissal of a charging instrument includes the right to appeal "whenever the order effectively terminates the prosecution in favor of the defendant." *State v. Moreno*, 807 S.W.2d 327, 332 (Tex. Crim. App. 1991) (en banc). As the *Moreno* court stated, an order "effectively terminates the prosecution against the accused" when "the effect of [the] order forces any alteration of the indictment or information before the trial on the merits and the State is not willing to comply with that order." *Id.* at 334.

***3** The challenged order grants Appellee's motion for specific performance and orders the State to dismiss. The order does not by its terms purport to dismiss the indictment, although the trial court stated as much at the hearing's conclusion. The practical effect of the trial court's order is to preclude further prosecution because the court announced the case was dismissed and ordered the State to dismiss it. Thus, we hold that the State may appeal from the challenged order in the same manner as the State may appeal from an order expressly dismissing an indictment. *See id.* at 332, 333 (explaining that article 44.01 must be liberally construed to achieve its purpose of permitting the State to appeal "from any order concerning an indictment or information whenever the order effectively terminates the prosecution in favor of the defendant"); *see also In re State ex rel. Valdez*, 294 S.W.3d 337, 340 (Tex. App.—Corpus Christi 2009, orig. proceeding) (relator's petition for mandamus requesting the appellate court to direct the trial court "to grant the State's agreed motion to dismiss an indictment based on an immunity agreement" was "outside the bounds of mandamus relief"). Because the State has an adequate remedy at law by ordinary appeal, we dismiss the State's petition for writ of mandamus, case no. 14-20-00539-CR, as moot.

II. Merits of the State's Appeal

In a single issue, the State argues the "trial court was without authority to dismiss the charging instrument or order the State to dismiss it." We disagree.

We apply a bifurcated standard of review when considering a trial court's decision to dismiss a case. *State v. Krizan-Wilson*, 354 S.W.3d 808, 815 (Tex. Crim. App. 2011). We afford almost total deference to a trial court's findings of fact that are supported by the record, as well as any mixed questions of law and fact that rely upon the credibility of witnesses. *Id.* When resolution of the case turns solely on questions of law or mixed questions that do not depend on credibility determinations, our review is *de novo*. *Id.*

In Texas, "the power to grant immunity from prosecution is statutory rather than constitutional" and is derived "from the statutes that authorize officers of the Judicial Department to dismiss prosecutions." *Graham v. State*, 994 S.W.2d 651, 653-54 (Tex. Crim. App. 1999) (citing *Zani v. State*, 701 S.W.2d 249, 253 (Tex. Crim. App. 1985) (en banc)). Under the relevant statute, the county attorney or district attorney has the authority to dismiss a prosecution, but only with the approval of the trial court. *See* Tex. Code Crim. Proc. Ann. art. 32.02 ("No case shall be dismissed without the consent of the presiding judge."). Accordingly, a grant of immunity from prosecution requires the trial court's approval. *See id.*; *see also Smith v. State*, 70 S.W.3d 848, 851 (Tex. Crim. App. 2002) (en banc) ("a District Attorney has no authority to grant immunity without court approval, for the approval of the court is essential to establish immunity") (internal quotation omitted).

Here, Appellee asserted in her "Motion for Specific Performance" that the State "promised to not refile the case against" her. Defense counsel's declaration filed in support of Appellee's motion averred that prosecutor O'Donnell "agreed that regardless of the disposition of the misdemeanor Driving While Intoxicated cases, he would dismiss the felony Assault of a Peace Officer" and "made multiple promises ... that he would not only dismiss the felony case regardless of the misdemeanor dispositions, but that he would promise to never re-file the felony case."

At the hearing on Appellee's motion, O'Donnell testified that he "remember[ed] telling [defense counsel] that [his] intention was to dismiss the case and that it was not [his] intention to re-file this case" but did not recall using the words "gentleman's agreement" or "promise".

Granting Appellee's motion, the trial court found as follows:

> It appears we have a disagreement as to memory. Mr. O'Donnell has admitted that he merely does not remember, but he cannot refute the things that [defense counsel] has presented.
>
> As such, I'm inclined to grant [Appellee's] motion for specific performance in this case, which I believe is the honoring of the promise.... [A] promise was made to dismiss this case no matter what. A dismissal was filed. A promise was made not to re-file. It was re-filed. And therefore, I'm granting this motion.

***4** Under the applicable standard of review, we defer to the trial court's finding of fact regarding what prosecutor O'Donnell promised to defense counsel regarding Appellee's future immunity from the felony charge. *See Krizan-Wilson*, 354 S.W.3d at 815. This finding was premised on the trial court's resolution of O'Donnell's and defense counsel's differing accounts of what was promised with respect to Appellee's immunity agreement. The record does not warrant revisiting this determination. By granting Appellee's motion for specific performance, the trial court provided the approval necessary to render the grant of immunity enforceable. *See* Tex. Code Crim. Proc. Ann. art. 32.02; *see also Smith*, 70 S.W.3d at 851; *Graham*, 994 S.W.2d at 654.

On appeal, the State contends that a "prosecutor's offer of immunity from future prosecution is binding only if the trial court approves of the offer ***when it is made***." (emphasis added). But the relevant authorities do not support this interpretation regarding when the trial court's approval must be secured. Specifically, neither statute nor case law indicates that the trial court's approval of an immunity agreement must be concurrent with the offer itself. *See* Tex. Code Crim. Proc. Ann. art. 32.02 ("No case shall be dismissed without the consent of the presiding judge."); *see also Smith*, 70 S.W.3d at 855 (stating that the trial court must "approve[ ] the dismissal that ***results*** from an immunity agreement") (emphasis added). Moreover, the trial court granted both the State's motion to dismiss and Appellee's motion for specific performance, thereby supplying the necessary approval both when the agreement was made and when Appellee sought to have it enforced.

The State also argues that O'Donnell's promise to defense counsel constituted a "unilateral contract" that is "enforceable only when the promisee performs." Asserting that "[A]ppellee did nothing", the States contends that O'Donnell's "promise, without any performance by the [A]ppellee, is not enforceable."

We reject this contention. In *Smith v. State*, the Court of Criminal Appeals delineated the trial court's and the prosecutor's differing roles with respect to immunity agreements:

> The terms and conditions of an immunity agreement are wholly within the bargaining process of the parties involved in the contract, subject to the veto power of the court over their final agreement. Often the required level of performance under the agreement will be to the satisfaction of the prosecutor. We will not place courts in a position that requires them to supervise the performance of every witness under an immunity agreement.
>
> Supervision of the performance of an immunity agreement is the province of the prosecutor. ...
>
> Because it is the prosecutor who initiates a dismissal and sets the reasons for the dismissal, it is the prosecutor who is responsible for crafting the conditions of an immunity agreement. Provided the judge approves the dismissal that results from an immunity agreement, and is aware that the dismissal is pursuant to an immunity agreement, the judge does not have to be aware of the specific terms of that immunity agreement for it to be enforceable.

70 S.W.3d at 855. As *Smith* makes clear, the specific terms of Appellee's immunity agreement and corollary issues regarding whether those terms were met were the sole responsibility of the prosecutor. The trial court was not required to know the specific terms of the agreement nor was it required to supervise the parties' performance. *See id.*

Rather, the trial court possessed "veto power ... over [the parties'] final agreement." *Id.* Here, the trial court declined to veto the parties' immunity agreement and provided the approval necessary to render the agreement enforceable. *See* Tex. Code Crim. Proc. Ann. art. 32.02. Based on the appellate record and the deference we afford to the trial court's findings of fact regarding the immunity agreement, we affirm the trial court's order dismissing Appellee's felony charge.

***5** We overrule the State's issue on appeal.

RESPONSE TO THE DISSENT

Our dissenting colleague opines that O'Donnell's promise is unenforceable based on the absence of consideration. Accepting this position would effectively decree that a prosecutor's word is worthless, thereby inviting countless foreseeable incidents of mistrust between the State and the accused in Texas. We respectfully decline the dissent's invitation to create such precedent.

CONCLUSION

We affirm the trial court's order granting Appellee's "Motion for Specific Performance."

(Jewell, J., dissenting).

DISSENTING OPINION

Kevin Jewell, Justice

The State appeals an order effectively dismissing a felony charge against appellee. The State contends the trial court lacked authority to order the case dismissed because the State did not consent. According to appellee, however, the trial court's order merely enforces by specific performance the prosecutor's earlier promise to dismiss the case and not re-file it. After the prosecutor made that promise, he dismissed the case. Later, his supervisors instructed him to re-file it, and he did. Appellee asserts that re-filing the case despite the prosecutor's promise not to do so violated her due process rights, and the trial court's order compelling the State to perform the promise should be affirmed.

Our court affirms the judgment. I dissent because the majority's disposition has no basis in law and mischaracterizes the facts.

Background

Appellee was arrested for felony assault of a public servant and misdemeanor driving while intoxicated ("DWI") arising from a single incident. While these charges were pending, appellee was charged with a second misdemeanor DWI. Natalie Schultz represented appellee in the felony case; another attorney represented appellee in the misdemeanor cases.

The State offered to dismiss the felony assault charge if appellee pleaded guilty to the DWI charges. Schultz wanted to accept the State's plea offer, but appellee's misdemeanor defense counsel did not. Schultz believed appellee was being treated unfairly because the proposed felony disposition was contingent on the misdemeanor dispositions, and appellee's misdemeanor defense counsel did not want to accept the State's plea offer. Schultz discussed her concerns with the felony prosecutor several times.

When the felony case trial date arrived, the misdemeanor cases were still unresolved. The felony prosecutor believed it inappropriate to proceed to trial on the felony assault case when the State had offered to dismiss that charge if appellee pleaded guilty to the misdemeanor charges. The prosecutor and Schultz discussed that the State would file a motion to dismiss the felony case, which would contain a statement reserving the State's right to re-file. The prosecutor told Schultz, however, that he would not re-file the felony case and that he would not instruct any other prosecutors to re-file the felony case. The prosecutor then filed a motion to dismiss, which stated expressly that the State reserved the right to re-file. The trial court signed an order dismissing the felony case on January 22, 2020 (the "January Dismissal Order").

***6** At the time the prosecutor filed the motion to dismiss, he was under the impression that appellee would plead guilty in the misdemeanor cases. Appellee acknowledges, however, that no plea bargain agreement was consummated; her misdemeanor counsel was unwilling to agree to a plea bargain. The prosecutor later learned that the misdemeanor DWI charges were dismissed, and no plea had been made in those cases.[1]

[1] According to appellee, the DWI charges were dismissed because the blood test results were unreliable.

According to Schultz, the arresting officer connected to the assault charge learned that the DWI cases had been dismissed, and the officer complained to the district attorney's office. Later, the felony prosecutor's supervisor instructed him to re-file the felony case. The prosecutor called Schultz to inform her of these events. The

prosecutor apologized but said he was under instructions to re-file the felony case, which he did.

In the re-filed felony proceeding, appellee promptly filed a "Motion for Specific Performance," accompanied by a brief and an unsworn declaration signed by defense counsel.[2] In her declaration, Schultz stated that the felony prosecutor had promised to dismiss and not re-file the felony assault case against appellee "no matter what" happened with the misdemeanor DWI charges. Schultz also averred that she and the prosecutor had a "gentleman's agreement" to dismiss the felony charge. In the motion, appellee asserted that re-filing the felony case violated her due process rights because the Fourteenth Amendment's due process clause "requires that a promise made by the prosecutor be fulfilled." She argued that when a prosecutor does not carry out his side of a plea bargain, a defendant is entitled to have the agreement specifically performed or the plea withdrawn. Acknowledging that the present case involved not a plea bargain agreement but a "broken promise to dismiss," appellee urged nonetheless that specifically enforcing the prosecutor's unilateral promise was the only appropriate remedy.

[2] *See* Tex. Civ. Prac. & Rem. Code § 132.001(a), (c), (d).

At the hearing on the motion, the felony prosecutor testified as described above. He acknowledged that he told Schultz that he had no intention of re-filing the felony case. But he could not recall using the terms "promise" or "gentleman's agreement" in his discussions with appellee's counsel. The trial court asked the prosecutor if the disposition of the felony case would have changed if the DWI cases been dismissed prior to the felony trial date. Acknowledging that was possible, the prosecutor explained further,

> I believed there was probable cause for the case. That there was a – it was a righteous charge that [appellee] faced.
>
> But given the fact that there were two DWI charges and that there were – the assault of the peace officer stemmed from one of the driving while intoxicated charges, I felt that it would be better served for [appellee] to get help for any alcohol or substance abuse issues that she may have rather than being saddled with a felony conviction. That was my preference in the case.

The trial court found the felony prosecutor to be "an honorable, forthright, and honest prosecutor"; it found Schultz's declaration to be true and correct; and it found that the prosecutor promised to dismiss the case "no matter what", but that the prosecutor simply did not remember making that promise. The court did not find that a contract existed. The trial court granted the motion for specific performance and declared on the record that the case "is dismissed." On the June 16, 2020 signed order granting the motion, the trial court wrote, "State is ordered to dismiss" (the "June Dismissal Order").

***7** The State filed this appeal together with an alternative petition for writ of mandamus. I agree with the majority that we have appellate jurisdiction and that the mandamus proceeding is appropriately dismissed as moot. *See* Tex. Code Crim. Proc. art. 44.01(a)(1); *State v. Moreno*, 807 S.W.2d 327, 332, 334 (Tex. Crim. App. 1991).

Analysis

A. Standard of review and governing law

We apply a bifurcated standard of review when considering a trial court's decision to dismiss a case. *State v. Krizan-Wilson*, 354 S.W.3d 808, 815 (Tex. Crim. App. 2011). We afford almost total deference to a trial court's findings of fact that are supported by the record, as well as any mixed questions of law and fact that rely upon the credibility of witnesses. *Id.* But when resolution of the case turns solely on questions of law or mixed questions that do not depend on credibility determinations, our review is de novo. *Id.*

A trial court has no general authority, inherent or implied, to dismiss a case without the prosecutor's consent. *See State v. Plambeck*, 182 S.W.3d 365, 368 (Tex. Crim. App. 2005) (discussing *State v. Johnson*, 821 S.W.2d 609, 613 (Tex. Crim. App. 1991)); *State v. Dinur*, 383 S.W.3d 695, 699 (Tex. App.—Houston [14th Dist.] 2012, no pet.). This rule applies except in limited circumstances when a dismissal is authorized by statute, common law, or the constitution. *See State v. Mungia*, 119 S.W.3d 814, 816 (Tex. Crim. App. 2003). Thus, for example, a trial court may dismiss a case without the State's consent when a defendant's constitutional right to a speedy trial or right to counsel has been violated, or if there is a defect in the charging instrument, or when a defendant has been

detained and no charging instrument is properly presented. *See id.* These are not the only circumstances in which a trial court may dismiss charges without the State's consent, but such a dismissal is "a drastic measure only to be used in the most extraordinary circumstances." *Id.* at 817.

B. The trial court erred in signing the June Dismissal Order over the State's objection, and the majority errs in affirming that order.

In its sole issue, the State contends that the trial court was without authority to dismiss the charging instrument or order the State to dismiss the re-filed case when the State did not consent. Further, assuming the prosecutor promised to dismiss the felony charge in January and not re-file it, as the trial court found, the State argues such a promise is unenforceable because it is not supported by consideration or a court-approved immunity agreement. I would sustain the State's issue.

The majority's contrary disposition is based on a misconception that the prosecutor's January promise constituted an "immunity agreement," which is itself based in part on a misstatement of the trial court's findings. The majority reasons that the January Dismissal Order was in essence a dismissal with prejudice based on what the court characterizes as an "immunity agreement." Citing Code of Criminal Procedure article 32.02, the majority says that appellee had an immunity agreement with the State in January, which the trial court "approved" six months later in June when the court granted appellee's motion for specific performance. The majority also cites *Smith*[3] and *Graham*.[4] But these authorities do not support the majority's holding.

[3] *Smith v. State*, 70 S.W.3d 848, 851 (Tex. Crim. App. 2002).

[4] *Graham v. State*, 994 S.W.2d 651, 654 (Tex. Crim. App. 1999).

***8** For the several reasons that follow, I would hold that the January Dismissal Order was not a dismissal with prejudice based on an approved immunity agreement and that the trial court's June Dismissal Order granting appellee's motion for specific performance was error. In sum, there is neither evidence of an "immunity agreement" nor evidence of court consent to any agreement.

1. *There exists no immunity "agreement."*

It is undisputed that the State did not consent to dismissal of the re-filed felony case. Therefore, the trial court could not order the case dismissed unless a statutory, common law, or constitutional basis existed to support dismissal over the State's objection. *See Plambeck*, 182 S.W.3d at 368; *Mungia*, 119 S.W.3d at 816.

I begin with appellee's arguments. Appellee contends an exception exists because the State's decision to re-file the felony case violated her due process right under the Fourteenth Amendment to the federal Constitution. Appellee maintains that a prosecutor's promise to dismiss and not re-file a case must be fulfilled and is enforceable by specific performance. She directs us to cases recognizing the availability of specific performance in the criminal context, namely *Gibson v. State*, 803 S.W.2d 316, 318 (Tex. Crim. App. 1991), and *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971).

Appellee's authority, however, does not support the contention that her due process rights were violated. Those cases are inapplicable because they involved plea agreements, and the present case does not. In *Gibson*, for instance, a grand jury indicted Gibson for possession of amphetamine and retaliation. *Gibson*, 803 S.W.2d at 317. Gibson entered into a written plea agreement with the prosecutor in which he agreed to plead guilty to the retaliation charge in exchange for a forty-year sentence, no deadly weapon finding, and dismissal of the possession charge. *Id.* The parties submitted the agreement to the trial court, and the trial court announced that it would follow the plea bargain and assessed Gibson's punishment for the retaliation case as recommended by the prosecutor. *Id.* However, for a reason not reflected in the record, the possession charge was not dismissed. *Id.* Thereafter, Gibson filed a motion for enforcement of the plea agreement in the possession case and sought dismissal of that charge pursuant to the plea agreement. *Id.* The trial court denied the motion, and Gibson was subsequently tried and found guilty of possession. *Id.* On appeal from his possession conviction, Gibson asserted that he had a federal constitutional right to have the plea agreement enforced. *Id.* The Court of

Criminal Appeals agreed:

> When, as in this cause, a guilty plea rests to any significant degree on a promise of the prosecutor, so that it can be said that the promise is part of the inducement or consideration for the plea, the due process clause of the Fourteenth Amendment requires that such promise be fulfilled. If for some reason the prosecutor does not carry out his side of the agreement, the defendant is entitled to have the agreement specifically performed or the plea withdrawn, whichever is more appropriate under the circumstances.

Id. at 318.

Here, there was no plea agreement. The record does not indicate that appellee accepted the State's plea offer, and appellee did not perform any part of an exchange by pleading guilty to the misdemeanor DWI charges or by relying on the State's plea offer in any way. Instead, it is undisputed that her misdemeanor defense counsel refused to agree to the plea offer and that the misdemeanor DWI charges against her were dismissed.

***9** Moreover, in response to the majority's position, I conclude there is no evidence of an agreement of any kind, including one granting immunity in exchange for anything from appellee. What the majority characterizes as an "agreement" is at most a unilateral promise by the prosecutor. Although the trial court found the prosecutor in fact made a promise to "dismiss this case no matter what," the court did *not* find an agreement existed. The majority quotes the court's ruling from the record but notably omits the part where the trial judge said he was "not sure" that the promise "is a contract." He continued, "I'm not sure that contract law is something that we hear in here."

An immunity "agreement" requires an exchange of consideration. *Accord Smith v. State*, 96 S.W.3d 377, 383 (Tex. App.—Amarillo 2002, pet. ref'd) (explaining that, because an immunity agreement is a contract, analysis "must be based on contract law"). There was no exchange here, nor any bargained-for promise, nor any reliance on a promise to appellee's detriment. Thus, there existed no immunity "agreement" for the court to approve. The prosecutor's statement that he had no intention to re-file the felony case is not an assurance on which appellee could rely for purposes of enforcing the statement, absent the existence of an approved immunity agreement or a plea agreement, neither of which exist here. *See Graham*, 994 S.W.2d at 654. Perhaps some action by appellee in reliance on the prosecutor's statement could result in a binding commitment, *see State v. Bragg*, 920 S.W.2d 407, 409 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd), but there exists no evidence of reliance either.

My conclusion is consistent with general contract law, which I believe applies.[5] *See Smith*, 96 S.W.3d at 383. The prosecutor's statement to appellee's counsel was at most a unilateral promise, which generally is not enforceable absent consideration. *See Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 408-09 (Tex. 1997) (consideration is an essential element for a valid, enforceable contract); Restatement (Second) of Contracts § 75 cmt. a (no duty is generally imposed on one who makes an informal promise unless the promise is supported by sufficient consideration). When a promisor's performance is optional, the promise is illusory and cannot constitute valid consideration. *See Vanegas v. Am. Energy Servs.*, 302 S.W.3d 299, 301 (Tex. 2009); *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 645 (Tex. 1994) ("When illusory promises are all that support a purported bilateral contract, there is no contract."); Restatement (Second) of Contracts §§ 2 cmt. e; 77 cmt. a. An illusory promise is one that fails to bind the promisor, who retains the option of discontinuing performance. *CRC-Evans Pipeline Int'l, Inc. v. Myers*, 927 S.W.2d 259, 263 (Tex. App.—Houston [1st Dist.] 1996, no writ). Here, the prosecutor's promise to dismiss the felony case and not re-file charges was illusory because the State retained the right to re-file charges in the written motion to dismiss. The promise was gratuitous, and Texas courts do not enforce gratuitous promises. *See Fleck v. Baldwin*, 141 Tex. 340, 172 S.W.2d 975, 978 (1943).

[5] Presumably, appellee and my colleagues in the majority are of a similar view that contract principles apply, as appellee sought to enforce the prosecutor's promise by seeking specific performance, a contract remedy, and the majority agrees she is entitled to that relief.

I say that the prosecutor's statement was "at most" a unilateral promise because, according to the Restatement, his assurance to appellee's counsel not to re-file the felony case likely did not qualify as a "promise." Restatement section 2 defines "promise" as a "manifestation of intention to act or refrain from acting in

a specified way, *so made as to justify a promisee in understanding that a commitment has been made.*" Restatement (Second) of Contracts, § 2 (emphasis added). The prosecutor's statement that he would not re-file the felony case could not have justified appellee in understanding that the State was bound to a commitment because the motion to dismiss reserved the State's right to re-file and appellee was aware of the prosecutor's intention to include such a reservation in the motion to dismiss. "Even if a present intention is manifested, the reservation of an option to change that intention means that there can be no promisee who is justified in an expectation of performance." *Id.* cmt. e.

***10** Accordingly, I would hold that the January Dismissal Order was without prejudice to the State's right to re-file charges. Further, I conclude that, absent the accused giving something in exchange for the prosecutor's promise to dismiss and not re-file, that promise was not, in this circumstance, binding on the State. *See Zani v. State*, 701 S.W.2d 249, 253 (Tex. Crim. App. 1985) ("[T]hese [immunity] grants are nothing more than *contracts* in which *each party gains a benefit and suffers a burden*, we must determine those relative benefits and burdens to ensure that each has adequately performed." (emphasis added)); *Bragg*, 920 S.W.2d at 409 (rejecting appellee's argument that State agreed not to re-prosecute when appellee did not detrimentally rely on the State's assertions). There exists neither an immunity agreement nor a guilty plea induced by the dismissal of the felony assault charges, as there was in *Gibson*, and appellee's due process rights are not implicated by the re-filing of the indictment in this case. As the majority's holding is grounded on the existence of an "immunity agreement," it is error.

I express no opinion on whether the prosecutor's statement would bind the State if the motion to dismiss had not reserved the right to re-file and if the prosecutor had not told appellee's counsel that the motion would reserve the State's right to re-file.

2. *The prosecutor's promise not to re-file the felony charge is not an enforceable grant of immunity because the court never approved it.*

Assuming for argument's sake that the prosecutor's promise could be construed as an "immunity agreement," there is no evidence the trial court approved any agreement in January, and it could not have approved one in June.

Article 32.02 governs a prosecutor's authority to dismiss a case. Tex. Code Crim. Proc. art. 32.02.[6] It directs that a dismissal sought by the prosecutor must be approved by the trial court. *Id.*; *Smith*, 70 S.W.3d at 851. Therefore, "a District Attorney has no authority to grant immunity without court approval, for the approval of the court is 'essential' to establish immunity." *Smith*, 70 S.W.3d at 851 (footnotes omitted). A prosecutor's grant of immunity from future prosecution is binding only with the trial court's consent. *See Graham*, 994 S.W.2d at 654 ("When a court has not approved a prosecutor's agreement to grant immunity from prosecution, there is no grant of immunity on which a defendant can rely."); *see also Smith*, 70 S.W.3d at 851. Importantly, if a prosecutor's decision to dismiss "results from an immunity agreement," the court must at least "be aware that the dismissal is pursuant to an immunity agreement," even though the court need not know the terms. *Smith*, 70 S.W.3d at 855.

[6] This article provides:

> **Dismissal by state's attorney**
> The attorney representing the State may, by permission of the court, dismiss a criminal action at any time upon filing a written statement with the papers in the case setting out his reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge.

Tex. Code Crim. Proc. art. 32.02.

a. No court approval in January

The State's January 22, 2020 motion to dismiss, and the court's order of the same date, do not indicate any awareness by the court that the State's dismissal was based on or resulted from an immunity agreement not to re-file the felony charge. The record facially refutes any contrary suggestion. The State's motion clearly states, "State reserves right to refile." The prosecutor informed appellee's counsel that the motion to dismiss would include a statement reserving the State's right to re-file the felony charge. Additionally, I see no evidence elsewhere establishing that the trial court was aware on January 22 that the dismissal was "pursuant to an

immunity agreement." *Id.* The order does not state, for example, that the dismissal is "with prejudice," which might indicate court awareness of an immunity agreement.[7] In January, the trial court consented to dismissal, but it could not have consented to any immunity agreement because there is no evidence that the motion to dismiss "resulted from an immunity agreement," or that the court was "aware" of any immunity agreement. *Id.*

[7] A motion to dismiss that reserves a right to re-file is not consistent with a motion to dismiss with prejudice. *See State v. Atkinson*, 541 S.W.3d 876, 879 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

***11** By not concluding that the trial court approved an immunity agreement in January, I presume my colleagues in the majority agree that the court was not aware of, and thus did not consent to, a dismissal based on an immunity agreement in January.

b. No court approval in June

According to the majority, "[b]y granting Appellee's motion for specific performance, the trial court provided the approval necessary to render the grant of immunity enforceable." Maj. Op. at ——. The court says the June Dismissal Order, coupled with the January Dismissal Order, "suppl[y] the necessary approval" for article 32.02 purposes.

The majority's theory has several fatal problems.

First, article 32.02 has no applicability to appellee's motion for specific performance in the re-filed action,[8] and appellee has not contended otherwise. Article 32.02 is entitled, "Dismissal by state's attorney." By its terms, it governs when the *State* seeks dismissal. The State was not seeking to dismiss the new cause number; appellee was. Moreover, article 32.02 does not purport to deal with a case already reduced to final judgment. *See Satterwhite v. State*, 36 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd).[9] When the prosecutor is not requesting dismissal, generally the court lacks authority to dismiss, subject to exceptions not applicable here.[10]

[8] The original case was filed under cause number 1622433. The re-filed case was assigned a new cause number, 1667833.

[9] The court dismissed the original case—the January Dismissal Order—on January 22, 2020. No party filed a motion for new trial or appeal from that order. It became final February 21, 2020, and the trial court lost plenary jurisdiction over that cause. In a criminal case, if no party timely files a motion for new trial, a motion in arrest of judgment, or other similar motion, the trial court's plenary power expires thirty days after sentence is imposed or an appealable order issues. Tex. R. App. P. 21.4, 22.3; *Collins v. State*, 240 S.W.3d 925, 927 n.2 (Tex. Crim. App. 2007); *In re Gibson*, Nos. 12-16-00272-CR, 12-16-00273-CR, 2016 WL 5845831, at *1 (Tex. App.—Tyler Sept. 30, 2016, no pet.) (mem. op., not designated for publication).

[10] *Johnson*, 821 S.W.2d at 612 n.2, 613.

Additionally, any court approval of the purported immunity agreement necessarily would have to pre-date appellee's request to enforce the agreement, because, absent prior court approval, there is no binding agreement to enforce. Appellee's motion for specific performance sought to enforce a promise allegedly binding since January. But the majority is saying that court approval did not occur until June. If the prosecutor's promise was not binding on the State in January—it was not—then appellee's motion for specific performance was not based on a binding agreement and could only be denied.

For these reasons, I conclude there is no constitutional violation authorizing the "drastic remedy" of dismissing an indictment without the State's consent. *See Mungia*, 119 S.W.3d at 817. Appellee has not presented any statutory or common law basis supporting dismissal of the felony charge absent the State's consent. *See, e.g., id.* at 816 (explaining that, with no inherent authority to dismiss charges without the State's consent, a court must gain its authority to do so from constitution, statute, or common law). The majority's reasoning suffers from at least the critical errors I have mentioned and cannot rest on article 32.02, *Smith*, or *Graham.* Under these circumstances, I would hold that the trial court lacked authority to order the State to dismiss the felony assault charge against appellee. I would also hold that a prosecutor's unilateral

assurance to dismiss a case and not re-file it is not enforceable when that assurance was not part of a plea agreement or a court-approved immunity agreement. The majority's result is simply an attempt to conjure a rule that a prosecutor's unilateral promise to dismiss is enforceable, akin to equitable estoppel, which clearly does not exist in Texas. *Graham*, 994 S.W.2d at 656.

***12** In closing, I note my agreement with Judge Cochran, who observed the wisdom of a rule requiring immunity agreements be documented, signed by the defendant, his counsel, the prosecutor, and the trial judge. *Smith*, 70 S.W.3d at 856 (Cochran, J., concurring). I echo that sentiment. Once the prosecutor assured appellee that the case would be dismissed and not re-filed, appellee could have requested that assurance in writing. Appellee also could have alerted the court in January that the State's motion to dismiss included a reservation of the State's right to re-file that was inconsistent with the prosecutor's verbal assurances, thus bringing the issue to the court's attention at that time. Documenting or stating for the record any immunity understanding is the best way to ensure that the parties get what they bargain for, assuming a bargain is reached.

All Citations

--- S.W.3d ----, 2021 WL 4472551

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